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14 EDEN ENVIRONMENTAL CITIZEN'S GROUP, LLC

15  
16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18  
19

20 EDEN ENVIRONMENTAL CITIZEN'S ) Case No.:  
21 GROUP, LLC, a California limited liability )  
22 company, ) **COMPLAINT FOR INJUNCTIVE AND**  
23 Plaintiff, ) **DECLARATORY RELIEF, CIVIL**  
24 vs. ) **PENALTIES AND REMEDIATION**  
25 WESTERN COLLOID PRODUCTS, INC., a ) **(Federal Water Pollution Control Act, 33**  
26 suspended California corporation; WESTERN ) **U.S.C. §§1251 et seq.)**  
27 COLLOID N.C., INC., a California )  
28 corporation; GARY SCHOLTEN, an )  
individual; DALE SCHOLTEN, an individual;  
JUSTIN McDANIELS, an individual; and  
DOES 1-10, inclusive,  
Defendants.

1 Plaintiff EDEN ENVIRONMENTAL CITIZEN'S GROUP, LLC ("EDEN") hereby  
2 brings this civil action pursuant to the Federal Water Pollution Control Act, also known as the  
3 Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*

4 **INTRODUCTION**

5 1. This action is a citizen suit for injunctive relief, declaratory relief, civil penalties,  
6 and remediation against Defendants for current and ongoing violations of the National Pollutant  
7 Discharge Elimination System ("NPDES") permit requirements of the CWA.

8 2. On or about May 11, 2019, EDEN provided a Notice of Defendants' violations of  
9 the CWA to the (1) Administrator of the United States Environmental Protection Agency  
10 ("EPA"), (2) EPA's Regional Administrator for Region Nine, (3) Executive Director of the State  
11 Water Resources Control Board ("State Board") and (4) to Defendants, including a copy  
12 delivered to Defendant Justin McDaniels, the Facility Manager of Defendant WESTERN  
13 COLLOID PRODUCTS, INC, by certified mail, at 700 71<sup>st</sup> Street, Oakland, California ("the  
14 Facility"), as required by the CWA. 33 U.S.C. § 1365(b)(1)(A).

15 3. A copy of EDEN's Notice of Intent to Sue is attached hereto as Exhibit "A" and  
16 incorporated herein by reference.

17 4. More than sixty days have passed since EDEN's Notice was properly and  
18 lawfully served on Defendants, the State Board, and the Regional and National EPA  
19 Administrators. EDEN is informed and believes, and thereupon alleges, that neither the National  
20 EPA, nor the State of California has commenced or is diligently prosecuting a court action to  
21 redress the violations alleged in this complaint. This action's claim for civil penalties is not  
22 barred by any prior administrative penalty under section 309(g) of the CWA, 33 U.S.C. §  
23 1319(g).  
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## **JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. section 1331 (federal question), and 33 U.S.C. section 1365(a) (CWA citizen suit jurisdiction). The relief requested is authorized pursuant to 28 U.S.C. sections 2201-2202 (declaratory relief), 33 U.S.C. sections 1319(b), 1365(a) (injunctive relief), and 33 U.S.C. sections 1319(d), 1365(a) (civil penalties).

6. Venue is proper because Defendants reside in and the events or omissions giving rise to EDEN's claims occurred in this District. 28 U.S.C. §1391(b)(1), (2). Venue is also proper because the Facility's CWA violations have occurred and are occurring within the District. 33 U.S.C. § 1365(c)(1).

PARTIES

7. Plaintiff EDEN ENVIRONMENTAL CITIZEN'S GROUP, LLC ("EDEN") is an environmental membership group organized under the laws of the State of California as a limited liability company on June 1, 2018. EDEN previously existed as an unincorporated environmental citizen's association, with members who remain associated with EDEN as of the date of the filing of this Complaint.

8. EDEN's organizational purpose is the protection, preservation and enhancement of California's waterways. Its mission is implemented by enforcing the provisions of the Federal Clean Water Act and California's Industrial General Permit by seeking redress from environmental harms caused by Industrial Dischargers who pollute the Waters of the United States, through community education and citizen suit enforcement when necessary.

1       9.     EDEN's members donate their time and money resources to protect, enhance, and  
2 assist in the preservation and restoration of rivers, creeks, streams, wetlands, vernal pools, and  
3 their tributaries located in California.

4       10.    EDEN has members throughout California. Some of EDEN's members reside  
5 and work near the San Francisco Bay (the "Receiving Waters" for Defendant WESTERN  
6 COLLOID's Facility storm water run-off), and use those waters and their watersheds for surfing,  
7 kayaking, camping, cycling, recreation, sports, fishing, swimming, hiking, photography, nature  
8 walks and scientific study. Their use and enjoyment of these natural resources have been and  
9 continue to be adversely impaired by Defendants' failure to comply with the procedural and  
10 substantive requirements of the California Industrial General Permit and Federal Clean Water  
11 Act.  
12

14       11.    EDEN has standing as an association to bring this suit against Defendants, as at  
15 least one of EDEN's current members is experiencing ongoing and continuing harm particular to  
16 him or her as a specific result of Defendants' violations of the CWA, and the resulting adverse  
17 effects to the environment and the Receiving Waters downstream from the Facility, and has  
18 experienced such harm since at least the date that EDEN provided to Defendants a 60-day Notice  
19 of Intent to Sue.  
20

21       12.    Specifically, the individual member(s) experiencing harm from Defendants'  
22 violations of the CWA are afraid to utilize the Receiving Waters downstream from the Facility as  
23 specified in Paragraphs 10 and 11, above, due to the deadly and toxic pollution emanating from  
24 the WESTERN COLLOID facility caused by Defendants' environmental violations, which  
25 EDEN's members believe has entered into the Facility's Receiving Waters.  
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1       13. Defendants' ongoing violations of the General Permit and the CWA have and will  
2 continue to cause irreparable harm to EDEN and certain of its current members, for which they  
3 have no plain, speedy, or adequate remedy. The relief requested will redress the ongoing injury  
4 in fact to EDEN and its members. Litigation of the claims asserted and the relief requested in  
5 this Complaint will not require the participation in this lawsuit of individual members of EDEN.  
6

7       14. EDEN is informed and believes, and on such information and belief alleges, that  
8 Defendant WESTERN COLLOID PRODUCTS, INC. was formed on or about October 24, 1980  
9 as a California corporation, and is identified in the Regional Water Board's records as the  
10 Industrial General Permit applicant and operator of the Facility. However, according to the  
11 records of the California Secretary of State, WESTERN COLLOID PRODUCTS, INC. has been  
12 suspended by the California Franchise Tax Board for many years.  
13

14       15. EDEN is informed and believes, and on such information and belief alleges, that  
15 Defendant WESTERN COLLOID N. C, INC. was formed on or about December 10, 2001, as a  
16 California corporation, and is identified in the Regional Water Board's records as the co-operator  
17 of the Facility.  
18

19       16. EDEN is informed and believes, and on such information and belief alleges that  
20 Defendant GARY SCHOLTEN is the President, Chief Executive Officer and Chief Financial  
21 Officer for both Defendant WESTERN COLLOID PRODUCTS, INC. and Defendant  
22 WESTERN COLLOID N.C., INC., according to the documents on file with the California  
23 Secretary of State.  
24

25       17. EDEN is informed and believes, and on such information and belief alleges that  
26 Defendant DALE SCHOLTEN is the corporate Secretary for both Defendant WESTERN  
27 COLLOID PRODUCTS, INC. and Defendant WESTERN COLLOID N.C., INC. (hereinafter  
28

1 “WESTERN COLLOID”), according to the documents on file with the California Secretary of  
2 State.

3 18. EDEN is informed and believes, and on such information and belief alleges that  
4 Defendant JUSTIN McDANIELS is the operations manager of and the Legally Responsible  
5 Person for the WESTERN COLLOID Facility, according to the documents on file with the  
6 Regional Water Board.  
7

8 **STATUTORY BACKGROUND**

9 19. Congress declared that the Federal Clean Water Act was designed to “restore and  
10 maintain the chemical, physical, and biological integrity of the Nation’s waters” through federal  
11 and state cooperation to develop and implement “programs for preventing, reducing, or  
12 eliminating the pollution of navigable waters and ground waters.” 33 U.S.C. §§ 1251(a), 1252(a).  
13

14 20. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any  
15 pollutant into waters of the United States, unless such discharge is in compliance with various  
16 enumerated sections of the Act. Among other things, Section 301(a) prohibits discharges not  
17 authorized by, or in violation of, the terms of an NPDES permit issued pursuant to Section 402  
18 of the Act, 33 U.S.C. § 1342.  
19

20 21. Section 402(p) of the Act establishes a framework for regulating municipal and  
21 industrial storm water discharges under the NPDES program. 33 U.S.C. § 1342(p). States with  
22 approved NPDES permit programs are authorized by Section 402(p) to regulate industrial storm  
23 water discharges through individual permits issued to dischargers or through the issuance of a  
24 single, statewide general permit applicable to all industrial storm water dischargers. 33 U.S.C. §  
25 1342(p).  
26  
27  
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1       22. Pursuant to Section 402 of the Act, 33 U.S.C. § 1342, the Administrator of the  
2 U.S. EPA has authorized California's State Board to issue NPDES permits including general  
3 NPDES permits in California.

4                  General Permit

5       23. The State Board elected to issue a statewide general permit for industrial storm  
6 water discharges. The State Board originally issued the General Permit on November 19, 1991,  
7 and modified it on September 17, 1992. The State Board reissued the General Permit on April  
8 17, 1997, and again on April 1, 2014 (the "2015 Permit" or "General Permit"), pursuant to  
9 Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p). The 1997 Permit was in effect  
10 between 1997 and June 30, 2015. The 2015 Permit went into effect on July 1, 2015. The 2015  
11 Permit maintains or makes more stringent the same requirements as the 1997 Permit.  
12

13       24. In order to discharge storm water lawfully in California, industrial dischargers  
14 must comply with the terms of the General Permit or have obtained and complied with an  
15 individual NPDES permit. 33 U.S.C. § 1311(a).

16       25. The General Permit contains several prohibitions. Effluent Limitation V(A) of the  
17 General Permit requires dischargers to reduce or prevent pollutants in their storm water  
18 discharges through implementation of the Best Available Technology Economically Achievable  
19 ("BAT") for toxic and nonconventional pollutants and the Best Conventional Pollutant Control  
20 Technology ("BCT") for conventional pollutants. Discharge Prohibition III(C) of the General  
21 Permit prohibits storm water discharges and authorized non-storm water discharges that cause or  
22 threaten to cause pollution, contamination, or nuisance.  
23

24       26. Receiving Water Limitation VI(B) of the General Permit prohibits storm water  
25 discharges to any surface or ground water that adversely impact human health or the  
26

1 environment. Receiving Water Limitation VI(A) and Discharge Prohibition III(D) of the Permit  
2 prohibit storm water discharges that cause or contribute to an exceedance of any applicable water  
3 quality standards contained in Statewide Water Quality Control Plan or the applicable Regional  
4 Board's Basin Plan.

5       27. In addition to absolute prohibitions, the General Permit contains a variety of  
6 substantive and procedural requirements that dischargers must meet. Facilities discharging, or  
7 having the potential to discharge, storm water associated with industrial activity which have not  
8 obtained an individual NPDES permit must apply for coverage under the State's General Permit  
9 by filing a Notice of Intent to Comply ("NOI"). Dischargers have been required to file NOIs  
10 since March 30, 1992.

11       28. Dischargers must develop and implement a Storm Water Pollution Prevention  
12 Plan ("SWPPP"). The SWPPP must describe storm water control facilities and measures that  
13 comply with the BAT and BCT standards. The objective of the SWPPP requirement is to  
14 identify and evaluate sources of pollutants associated with industrial activities that may affect the  
15 quality of storm water discharges and authorized non-stormwater discharges from the facility,  
16 and to implement best management practices ("BMPs") to reduce or prevent pollutants  
17 associated with industrial activities in storm water discharges and authorized non-storm water  
18 discharges. General Permit, § X(C). These BMPs must achieve compliance with the General  
19 Permit's effluent limitations and receiving water limitations, including the BAT and BCT  
20 technology mandates.

21       29. To ensure compliance with the General Permit, the SWPPP must be evaluated and  
22 revised as necessary. General Permit, § X(B).

1       30. Failure to develop or implement an adequate SWPPP, or to update or revise an  
2 existing SWPPP as required, is a violation of the General Permit. General Permit, Fact Sheet  
3 §I(1).

4       31. Sections X(D) – X(I) of General Permit set forth the requirements for a SWPPP.  
5 Among other requirements, the SWPPP must include: a pollution prevention team; a site map; a  
6 list of significant materials handled and stored at the site; a description of potential pollutant  
7 sources; an assessment of potential pollutant sources; and a description of a specific mandatory  
8 set of minimum BMPs to be implemented at the facility that will reduce or prevent pollutants in  
9 storm water discharges and authorized non-stormwater discharges.

10      32. The General Permit further requires dischargers to implement and maintain, to the  
11 extent feasible, any one or more of the following advanced BMPs necessary to reduce or prevent  
12 discharges of pollutants in industrial storm water discharges: exposure minimization BMPs,  
13 storm water containment and discharge reduction BMPs, treatment control BMPs, and other  
14 advanced BMPs. General Permit, § X(H)(2). Failure to implement advanced BMPs as  
15 necessary to achieve compliance with either technology or water quality standards is a violation  
16 of the General Permit.

17      33. The General Permit also requires that the SWPPP include BMP Descriptions and  
18 a BMP Summary Table. General Permit, § X(H)(4), (5).

19      34. The General Permit requires dischargers to develop and implement an adequate  
20 written Monitoring and Reporting Program. The primary objective of the Monitoring and  
21 Reporting Program is to detect and measure the concentrations of pollutants in a facility's  
22 discharge to ensure compliance with the General Permit's discharge prohibitions, effluent  
23 limitations, and receiving water limitations.

1       35. As part of their monitoring program, Dischargers must identify all storm water  
2 discharge locations that produce a significant storm water discharge, evaluate the effectiveness  
3 of BMPs in reducing pollutant loading, and evaluate whether pollution control measures set out  
4 in the SWPPP are adequate and properly implemented.

5       36. Section XI(B) of the General Permit requires that Dischargers collect and analyze  
6 storm water samples from two qualifying storm events (“QSEs”) during the first half of each  
7 reporting year (July 1 to December 31) and two QSEs during the second half of each reporting  
8 year (January 1 to June 30), and that the samples be collected from all outfalls identified in the  
9 Facility SWPPP.

10      37. A QSE is a precipitation event that produces a discharge for at least one drainage  
11 area and is preceded by 48 hours with no discharge from any drainage area. General Permit  
12 §XI(B)(2)

13      38. Once the storm water samples have been collected, the General Permit requires  
14 that the Discharger deliver the samples to a qualified laboratory for analysis within 48 hours of  
15 collection (General Permit, Attachment H) and upload into SMARTS the resulting laboratory  
16 reports within 30 days from receipt of the report. General Permit § XI(B)(4)

17      39. Facilities are also required to make monthly visual observations of storm water  
18 discharges. The visual observations must represent the quality and quantity of the facility’s storm  
19 water discharges from the storm event. General Permit, § XI(A)

20      40. The General Permit requires operators to conduct an Annual Comprehensive  
21 Facility Compliance Evaluation (“Annual Evaluation”) that evaluates the effectiveness of current  
22 BMPs and the need for additional BMPs based on visual observations and sampling and analysis  
23 results. General Permit, § XV.

1       41. Under the General Permit, facilities must analyze storm water samples for pH, oil  
2 & grease and total suspended solids, as well as additional parameters indicated in the Permit by  
3 facility type and those parameters identified by the Discharger on a facility-specific basis that  
4 serve as indicators of the presence of all industrial pollutants identified in the pollutant source  
5 assessment. General Permit, § XI(B)(6)(c).

6       42. The US EPA has established Parameter Benchmark Values as guidelines for  
7 determining whether a facility discharging industrial storm water has implemented the requisite  
8 BAT and BCT. These benchmarks represent pollutant concentrations at which a storm water  
9 discharge could potentially impair, or contribute to impairing, water quality, or affect human  
10 health from ingestion of water or fish.

11       43. Section XVI(A) of the General Permit requires that all Dischargers must certify  
12 and submit via SMARTS an Annual Report no later than July 15th following each reporting year  
13 using the standardized format and checklists in SMARTS.

14       44. Furthermore, Section XXI(L) of the General Permit provides that all documents  
15 submitted to SMARTS, including SWPPPs and Annual Reports, be certified by a legally  
16 responsible party or duly authorized representative of the Facility, with the following  
17 certification:

18            21 "I certify under penalty of law that this document and all Attachments were prepared  
19 under my direction or supervision in accordance with a system designed to assure that qualified  
20 personnel properly gather and evaluate the information submitted. Based on my inquiry of the  
21 person or persons who manage the system or those persons directly responsible for gathering the  
22 information, to the best of my knowledge and belief, the information submitted is, true, accurate,  
23 and complete. I am aware that there are significant penalties for submitting false information,  
24 including the possibility of fine and imprisonment for knowing violations."

25       45. Section XXI(N) of the General Permit provides that any person who knowingly  
26 makes any false material statement, representation, or certification in any record or other  
27

1 document submitted or required to be maintained under the General Permit, including reports of  
2 compliance or noncompliance shall upon conviction, be punished by a fine of not more than  
3 \$10,000, or by imprisonment for not more than two years, or by both. *See also* Clean Water Act  
4 section 309(c)(4)

5 San Francisco Bay Regional Basin Plan

6 46. The Water Quality Control Board, San Francisco Bay Region has adopted the  
7 “San Francisco Bay Basin (Region 2) Water Quality Control Plan” (“Basin Plan”), as amended  
8 by Resolution No. R2-2010-0100, setting forth the Water Quality Standards (“WQS”) and  
9 beneficial uses for San Francisco Bay and its tributaries.

10 47. The Beneficial Uses for San Francisco Bay are industrial service supply, shellfish  
11 harvesting, fish migration, preservation of rare and endangered species, fish spawning,  
12 commercial and sportfishing, estuarine habitat, wildlife habitat, recreational activities involving  
13 contact with water, recreational activities involving proximity to water, and navigation. *See*  
14 Basin Plan, Table 2-1.

15 48. Surface waters that cannot support the Beneficial Uses of those waters listed in  
16 the Basin Plans are designated as impaired water bodies pursuant to Section 303(d) of the Clean  
17 Water Act, 33 U.S.C. § 1313(d).

18 49. Polluted discharges from industrial sites, such as the Facility, contribute to the  
19 degradation of these already impaired surface waters and aquatic-dependent wildlife. Discharges  
20 of pollutants at levels above WQS contribute to the impairment of the Beneficial Uses of the  
21 waters receiving the discharges. WQS applicable to dischargers covered by the Storm Water  
22 Permit include, but are not limited to, those set out in the Basin Plan and in the Criteria for  
23 Priority Toxic Pollutants for the State of California (“CTR”), 40 C.F.R. § 131.38.  
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1       50.     The Basin Plan sets forth, among other things, narrative WQS for floating  
2 material, O&G, sediment, settleable matter, and suspended materials, and sets forth numeric  
3 WQS for pH, arsenic, cadmium, chromium VI, copper, cyanide, lead, mercury, nickel, selenium,  
4 silver, tributyltin, zinc, and PAHs. *See* Basin Plan §§ 3.3.6, 3.3.7, 3.3.9, 3.3.12-3.3.14, 3.3.21,  
5 and Table 3-3.

6       51.     The Basin Plan also includes site specific objectives (“SSOs”), which are WQS  
7 for specific sites, for certain pollutants of concern, including copper and nickel. *See* Basin Plan,  
8 Table 3-3A. The CTR includes numeric criteria set to protect human health and the environment  
9 in the State of California.

10       52.     Discharges with pollutant levels in excess of the CTR criteria, the Basin Plan  
11 standards, and/or other applicable WQS are violations of Receiving Water Limitations in Section  
12 VI(A) of the General Permit.

13       Citizen Suit Provision of the CWA

14       53.     Under the CWA, any citizen may commence a civil action against any person  
15 who is alleged to be in violation of an effluent standard or limitation under the CWA or an Order  
16 issued by a State with respect to such a standard or limitation.” 33 U.S.C. §1365(a)(1). No action  
17 may be commenced prior to sixty days after the plaintiff has given notice of the alleged violation  
18 (i) to the Administrator of the EPA, (ii) to the State in which the alleged violation occurs, and  
19 (iii) to any alleged violator of the standard, limitation, or order.” 33 U.S.C. § 1365(b)(1)(A). By  
20 including a citizen suit provision in the CWA, Congress ensured that the purposes and  
21 requirements of the CWA would be enforced, either by the United States government or by  
22 concerned citizens.

1       54. In furtherance of the water preservation goals established by the CWA, the citizen  
2 suit provision confirms the district court's jurisdiction to apply any appropriate civil penalties  
3 under section 1319(d). 33 U.S.C. § 1365(a). Section 1319(d) declares that any person who  
4 violates any permit condition or limitation implementing any of such sections in an NPDES  
5 permit shall be subject to a civil penalty not to exceed \$46,192 per day for each violation  
6 occurring before November 2, 2015, and \$51,570.00 per day per violation for violations  
7 occurring after November 2, 2015. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4; General Permit  
8 XXI.Q.1.

9  
10     55. Violations of provisions of the General Permit, including those detailed below,  
11 constitute violations of the CWA and are subject to civil penalties. General Permit § XXI; 33  
12 U.S.C. §§ 1319(d), 1342; 40 C.F.R. §§ 19.1-19.4.  
13

#### 14                   **FACTUAL ALLEGATIONS WHICH GIVE RISE TO CLAIMS**

15     56. Defendant WESTERN COLLOID manufactures reflective and specialty coatings,  
16 asphalt emulsions, primers and sealants for use in the roofing and paving industries. The Facility  
17 also manufactures polyester fabric and operates a large fleet of tankers for bulk transportation of  
18 its products to the customers of WESTERN COLLOID across the nation. EDEN is informed and  
19 believes that the Facility falls under standard industrial classification ("SIC") codes 2851 (paints,  
20 varnishes, lacquers and enamel manufacturing), 2819 (industrial inorganic chemical  
21 manufacturing) and 4213 (Trucking, without storage).

22  
23     57. EDEN is informed and believes that WESTERN COLLOID stores a vast amount  
24 of industrial materials outdoors (including toxic chemicals and materials) that can be exposed to  
25 storm water, eroded by wind, and otherwise contaminate the surrounding watershed.  
26  
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1       58. Specifically, WESTERN COLLOID manufactures numerous liquid coatings,  
2 primers, sealants and emulsions to which Material Data Safety Sheets apply. These Safety  
3 Sheets, which are posted on WESTERN COLLOID's public website at  
4 [www.westerncolloid.com](http://www.westerncolloid.com), indicate that the vast majority of the coatings, sealants, primers and  
5 emulsions are considered hazardous by the 2012 OSHA Hazard Communication Standard (29  
6 CFR 1910.1200), are known human carcinogens, cause genetic defects and cancer, and that the  
7 hazardous and toxic chemicals are not to be released to the environment or allowed to enter into  
8 sewers, drains or waterways.

9  
10      59. Notwithstanding the fact that WESTERN COLLOID has blatantly and willfully  
11 violated the Federal Clean Water Act and the Industrial General Permit, as delineated herein,  
12 Defendants nevertheless boast on their website that WESTERN COLLOID's products are  
13 environmentally friendly and that the company cares about protecting the environment.

14  
15      60. Based on EDEN's investigation, including a review of the Facility's Notice of  
16 Intent to Comply with the Terms of the Industrial General Permit ("NOI"), SWPPP, aerial  
17 photography, and EDEN's information and belief, storm water is collected and discharged from  
18 the Facility through a series of channels that discharge via at least one outfall. The outfall  
19 discharges storm water and pollutants contained in that storm water directly into the Arroyo  
20 Viejo Creek, which flows to into the San Francisco Bay, a navigable Water of the United States.

21  
22      61. Plaintiff is informed and believes, and thereupon alleges that the storm water  
23 flows over the surface of the Facility where industrial activities occur and areas where airborne  
24 materials associated with the industrial processes at the facility may settle onto the ground.  
25 Plaintiff is informed and believes, and thereupon alleges that storm water flowing over these

1 areas collects suspended sediment, dirt, metals, and other pollutants as it flows towards the storm  
2 water channels.

3 62. On information and belief, Plaintiff alleges that there are insufficient structural  
4 storm water control measures installed at the Facility. Plaintiff is informed and believes, and  
5 thereupon alleges, that the management practices at the Facility are currently inadequate to  
6 prevent the sources of contamination described above from causing the discharge of pollutants to  
7 waters of the United States.

8 Deficient SWPPP and Site Map/Failure to Follow and Update SWPPP

9 63. On information and belief, Plaintiff alleges that since at July 15, 2014, Defendant  
10 has failed to implement an adequate SWPPP for the Facility.

11 64. Plaintiff is informed and believes, and thereupon alleges, that the Facility's  
12 SWPPP does not set forth site-specific Best Management Practices (BMPs) for the Facility that  
13 are consistent with BAT or BCT for the Facility.

14 65. Plaintiff is informed and believes, and thereupon alleges, that the SWPPP  
15 prepared for the Facility does not comply with the requirements of Sections X(G)(1)(e), X(G)(2),  
16 and X(H) of the General Permit.

17 66. According to information available to EDEN, Defendant's SWPPP has not been  
18 evaluated to ensure its effectiveness and revised where necessary to further reduce pollutant  
19 discharges. Plaintiff is informed and believes, and thereupon alleges, that the SWPPP does not  
20 include each of the mandatory elements required by the General Permit.

21 67. Plaintiff is informed and believes, and thereupon alleges, that Defendant has  
22 failed and continues to fail to alter the Facility's SWPPP and site-specific BMPs consistent with  
23 the General Permit.

1       68. In addition, Plaintiff alleges that Defendant WESTERN COLLOID has failed to  
2 comply with the provisions of its current SWPPP in the areas of monitoring and reporting.

3       69. Information available to EDEN indicates that as a result of these practices, storm  
4 water containing excessive pollutants is being discharged during rain events into the San  
5 Francisco Bay, including the pollutants of Zinc, Aluminum, Titanium Dioxide, Calcium  
6 Carbonate, Quartz, Acrylic Polymers, Styrene, Silica, Ammonia, Total Suspended Solids, Oil &  
7 Grease, pH affecting substances, Asphalt and contaminated process water.

8       70. Specifically, WESTERN COLLOID's Site Map fails to include all areas of  
9 industrial activity, locations where materials are directly exposed to precipitation, and storm  
10 water sampling locations, in violation of Section X.E. of the General Permit.

11       71. WESTERN COLLOID's SWPPP fails to include a complete and detailed  
12 discussion of all Industrial Operations and all Industrial Materials present at the Facility, and an  
13 accurate and complete narrative assessment of all areas of industrial activity with potential  
14 pollutant sources, in violation of Sections X.F and X.G of the General Permit.

15       72. Specifically, the Facility's SWPPP fails to identify the chemicals utilized by the  
16 Facility as described in Paragraph 69, above, and as listed on the respective Material Data Safety  
17 Sheets. Instead, WESTERN COLLOID's SWPPP simply states that there are "dry chemicals"  
18 stored onsite and utilized in industrial operations.

19       73. Sections X and XI of the General Permit require each Facility to identify with  
20 specificity all industrial materials handled at the Facility, monitor the Facility's storm water run-  
21 off for any industrial material that may be exposed to the elements, and to develop Best  
22 Management Practices (BMPs) to reduce the likelihood of the industrial materials from entering  
23 the Facility's Receiving Waters through its polluted storm water run-off.

1       74. Not only have Defendants failed to properly identify in their SWPPP the deadly  
2 chemicals handled at the facility on a daily basis, but also they have failed to develop and  
3 implement BMPs and monitoring procedures to prevent these toxic and hazardous chemicals  
4 from entering and polluting the San Francisco Bay via the Facility's storm drain inlets.

5       75. Information available to Plaintiff indicates that Defendant has not fulfilled the  
6 requirements set forth in the General Permit for discharges from the Facility due to the continued  
7 discharge of contaminated storm water. Plaintiff is informed and believes, and thereupon  
8 alleges, that all the violations alleged in this Complaint are ongoing and continuing.

9  
10      Monitoring and Reporting

11       76. On information and belief, EDEN alleges that WESTERN COLLOID has no  
12 monitoring program at its Facility.

13       77. On information and belief, EDEN alleges that WESTERN COLLOID has failed  
14 to collect and analyze ANY storm water run-off samples from the Facility since at least July 15,  
15 2014.

16       78. Furthermore, WESTERN COLLOID has failed to conduct monthly visual  
17 observations at its Facility since at least July 15, 2014.

18  
19      Falsification of Annual Reports

20       79. EDEN is informed and believes that Defendants have submitted falsified Annual  
21 Reports to the Regional Water Quality Control Board in violation of Sections XXI(L) and  
22 XXI(N) of the General Permit.

23       80. Specifically, on June 26, 2017 and June 28, 2018, WESTERN COLLOID  
24 submitted its Annual Reports for the Fiscal Years 2015-16, 2016-2017, and 2017-18,  
25 respectively. These Reports were signed under penalty of law by Defendant Justin McDaniels.  
26  
27  
28

1 Mr. McDaniels is the currently designated Legally Responsible Person (“LRP”) for the  
2 WESTERN COLLOID Facility.

3       81.     The Annual Reports included Attachment 1 as an explanation for why Defendant  
4 WESTERN COLLOID failed to sample the required number of Qualifying Storm Events during  
5 the reporting years for all discharge locations, in accordance with Section XI.B. Defendant  
6 McDaniels certified in all three of the Reports, under penalty of perjury, that the required number  
7 of samples for each of the reporting periods were not collected by the Facility because there were  
8 insufficient qualifying storm water discharges occurring during the reporting year and scheduled  
9 facility operating hours.

10      82.     Records from the National Oceanic and Atmospheric Administration (NOAA)  
11 website/database confirm that during the reporting years 2015-16, 2016-17, and 2017-18, there  
12 were sufficient Qualified Storm Events (QSEs) occurring near the Facility during or within 12  
13 hours of the start of regular business hours to have allowed Defendant WESTERN COLLOID to  
14 collect the requisite number of samples.

15      83.     Based on the foregoing, it is clear that Defendant Justin McDaniels intentionally  
16 made false statements in the Facility’s 2015-16, 2016-17 and 2017-18 Annual Reports.

17                  Failure to File Timely Annual Reports

18      84.     EDEN is informed and believes that Defendants have failed to comply with  
19 Section XVI(A) of the General Permit, which provides that Dischargers shall certify and submit  
20 via SMARTS an Annual Report no later than July 15th following each reporting year using the  
21 standardized format and checklists in SMARTS.  
22  
23  
24  
25  
26  
27  
28

1       85. Specifically, WESTERN COLLOID's Annual Report for the reporting year 2015-  
2       16 was due on or before July 15, 2016. However, Defendants failed to file the Annual Report  
3       until June 18, 2018.

4                  Failure to Implement BAT/BCT and BMPs

5       86. EDEN is informed and believes that WESTERN COLLOID has failed to identify  
6       and implement Best Management Practices ("BMPs") at its Facility that comply with the  
7       requirements of the General Permit for best conventional treatment (BCT) for conventional  
8       pollutants, and best available technology (BAT) for toxic and non-conventional pollutants. These  
9       technology-based pollution controls are required to be implemented in a manner that reflects best  
10      industry practice considering technological availability and economic practicability and  
11      achievability. General Permit §§ I(C), V(A).

12      87. Information available to EDEN indicates that as a result of these practices, storm  
13      water containing excessive and deadly pollutants is being discharged during rain events from the  
14      Facility to the San Francisco Bay.

15                  Discharges of Contaminated Storm Water

16      88. Since at least July 15, 2014, Defendants have failed to collect and analyze even  
17      one Facility storm water run-off sample.

18      89. Information available to EDEN indicates that unauthorized non-storm water  
19      discharges occur at the Facility due to inadequate BMP development and/or implementation  
20      necessary to prevent these discharges.

21      90. Due to the nature of the operations at the Facility, coupled with the documented  
22      lack of proper BMP implementation and unauthorized non-storm water discharges, Defendants  
23      are discharging storm water containing excessive levels of pollutants specific to their operation  
24

1 during at least every significant local rain event. These pollutants include oil & grease, total  
2 suspended solids, aluminum, styrene, quartz, titanium dioxide, asphalt, and other toxic  
3 chemicals.

4 **Failure to Train Employees**

5 91. The General Permit require all Facilities to designate a Legally Responsible  
6 Person to implement the requirements of the Permit, who is then responsible for appointing a  
7 Pollution Prevention Team and ensuring that the Team is properly trained in at least the  
8 following minimum requirements: BMP implementation, BMP effectiveness evaluations, visual  
9 observations, and monitoring activities.  
10

11 92. Defendants have failed to implement adequate BMPs at the Facility, have not  
12 conducted monthly visual observations, and have failed to comply with required storm water  
13 sampling and analysis.  
14

15 **FIRST CAUSE OF ACTION**

16 **Failure to Prepare, Implement, Review, and Update  
17 an Adequate Storm Water Pollution Prevention Plan  
(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

18 93. Plaintiff re-alleges and incorporates all the preceding paragraphs as if fully set  
19 forth herein.  
20

21 94. The General Permit requires dischargers of storm water associated with industrial  
22 activity to develop and implement an adequate SWPPP.  
23

24 95. As outlined herein, Defendants have failed to develop and implement an adequate  
25 SWPPP for the Facility.  
26

27 96. Each day since July 15, 2014, that Defendants failed to develop, implement and  
28 update an adequate SWPPP for the Facility is a separate and distinct violation of the General  
Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a) against all Defendants.

**SECOND CAUSE OF ACTION**  
**Failure to Develop and Implement an**  
**Adequate Monitoring and Reporting Program**  
**(Violation of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

97. Plaintiff re-alleges and incorporates all the preceding paragraphs as if fully set forth herein.

98. The General Permit requires dischargers of storm water associated with industrial activity to have developed and be implementing a monitoring and reporting program (including sampling and analysis of discharges) that complies with the terms of the General Permit.

99. As outlined herein, Defendants have failed to develop and implement an adequate monitoring and reporting program for its Facility.

100. Defendants' ongoing failure to develop and implement an adequate monitoring and reporting program are evidenced by its failure to collect storm water samples pursuant to the requirements of the General Permit and to conduct monthly visual observations.

101. Each day since at least July 15, 2014, that Defendants have failed to develop and implement an adequate monitoring and reporting program for its Facility in violation of the General Permit is a separate and distinct violation of the General Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a) against all Defendants. The absence of requisite monitoring and analytical results are ongoing and continuous violations of the Act.

102. Noncompliance with the General Permit constitutes a violation of the CWA against all Defendants. General Permit § XXI.A; 33 U.S.C. § 1342.

## **THIRD CAUSE OF ACTION**

### **Submission of False Annual Reports to the Regional Water Board (Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

103. Plaintiff re-alleges and incorporates all the preceding paragraphs as if fully set forth herein.

1       104. Section XVI of the General Permit requires that Annual Reports submitted to  
2 SMARTS be certified under penalty of law, pursuant to Section XXI(L) which provides  
3 significant penalties for submitting false information.

4       105. Specifically, Clean Water Action section 309(c)(4) and Section XXI(N) of the  
5 General Permit provide a maximum penalty to any person who knowingly makes a false material  
6 statement, representation or certification in any record or other documents submitted or required  
7 to be maintained under the General Permit, including Annual Reports, up to and including a fine  
8 of \$10,000 and imprisonment of two years, or both.  
9

10     106. As delineated herein, Defendant WESTERN COLLOID's LRP Defendant Justin  
11 McDaniels made false representations in the Facility's Annual Reports for the reporting periods  
12 2015-16, 2016-17 and 2017-18 that the Facility was unable to sample the required number of  
13 QSEs during the reporting year for all discharge locations because there were insufficient QSEs  
14 in the vicinity of the Facility during operating hours.  
15

16     107. In fact, there were many QSEs during the reporting year during operating hours,  
17 according to NOAA records, such that the Facility could have easily collected the required  
18 number of samples.  
19

20     108. At the time that Defendant Justin McDaniels made the false representations  
21 referred to above, he knew or should have known that the representations were false but  
22 proceeded nonetheless to certify under penalty of law to the Regional Water Board that the  
23 information contained in the Annual Reports was true and correct.  
24

25     109. Each time that Defendants submitted false statements to the Regional Water  
26 Board under penalty of perjury is a separate and distinct violation of the General Permit and  
27 Section 301(a) of the Act, 33 U.S.C. § 1311(a) against all Defendants.  
28

## **FOURTH CAUSE OF ACTION**

**Failure to Submit Timely Annual Reports to the Regional Water Board  
(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

110. Plaintiff re-alleges and incorporates all the preceding paragraphs as if fully set forth herein.

111. The General Permit requires that all Dischargers certify and submit via SMARTS an Annual Report no later than July 15th following each reporting year.

112. As delineated herein, WESTERN COLLOID failed to file its Annual Report for the reporting year 2015-16 by July 15, 2016.

113. Each day that Defendants failed to submit WESTERN COLLOID 's Annual Report to the Regional Water Board in a timely manner is a separate and distinct violation of the General Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a) against all Defendants.

**FIFTH CAUSE OF ACTION**  
**Failure to Implement the Best Available and**  
**Best Conventional Treatment Technologies**  
**(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

114. Plaintiff re-alleges and incorporates all the preceding paragraphs as if fully set forth herein.

115. The General Permit's SWPPP requirements and Effluent Limitation V(A) of the General Permit require dischargers to reduce or prevent pollutants in their storm water discharges through implementation of BAT for toxic and nonconventional pollutants and BCT for conventional pollutants.

116. Defendants failed to implement BAT and BCT at the Facility for its discharges of TSS, Zinc, Aluminum, Oil & Grease, Silica, Quartz, Styrene, Asphalt, and other potentially un-monitored pollutants, in violation of Effluent Limitation V(A) of the General Permit.

117. Each day since at least July 15, 2014, that Defendants have failed to develop and implement BAT and BCT in violation of the General Permit is a separate and distinct violation of the General Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a) against all Defendants.

**SIXTH CAUSE OF ACTION**  
**Discharges of Contaminated Storm Water**  
**in Violation of Permit Conditions and the Act**  
**(Violations of 33 U.S.C. §§ 1311, 1342)**

118. Plaintiff re-alleges and incorporates all of the preceding paragraphs as if fully set forth herein.

119. Discharge Prohibition III(C) of the General Permit prohibits storm water discharges and authorized non-storm water discharges that cause or threaten to cause pollution, contamination, or nuisance. Receiving Water VI(B) of the General Permit prohibits storm water discharges to any surface or ground water that adversely impact human health or the environment. Receiving Water Limitation VI(A) and Discharge Prohibition III(D) of the Permit prohibit storm water discharges that cause or contribute to an exceedance of any applicable water quality standards contained in Statewide Water Quality Control Plan or the applicable Regional Board's Basin Plan.

120. Plaintiff is informed and believes, and thereupon alleges, that since at least July 15, 2014, Defendant WESTERN COLLOID has been discharging polluted storm water from the Facility, in excess of applicable water quality standards in violation of Receiving Water Limitation VI(A) and Discharge Prohibition III(D) of the General Permit.

121. During every rain event, storm water flows freely over exposed materials, waste products, and other accumulated pollutants at both facilities, becoming contaminated with iron, sediment, zinc, nitrates, phosphorus and other potentially un-monitored pollutants at levels above

1 applicable water quality standards. The storm water then flows untreated into the San Francisco  
2 Bay.

3 122. Plaintiff is informed and believes, and thereupon alleges, that these discharges of  
4 contaminated storm water are causing or contributing to the violation of the applicable water  
5 quality standards in a Statewide Water Quality Control Plan and/or the applicable Regional  
6 Board's Basin Plan in violation of Receiving Water Limitations of the General Permit.  
7

8 123. Plaintiff is informed and believes, and thereupon alleges, that these discharges of  
9 contaminated storm water are adversely affecting human health and the environment in violation  
10 of Receiving Water Limitations of the General Permit.

11 124. Every day since at least July 15, 2014, that Defendants have discharged and  
12 continue to discharge polluted storm water from the WESTERN COLLOID Facility in violation  
13 of the General Permit is a separate and distinct violation of Section 301(a) of the Act, 33 U.S.C.  
14 § 1311(a) against all Defendants. These violations are ongoing and continuous.  
15

16

#### 17 **SEVENTH CAUSE OF ACTION**

#### 18 **Failure to Properly Train Facility Employees and Pollution Prevention Team** **(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

19 125. Plaintiff re-alleges and incorporates all of the preceding paragraphs as if fully set  
20 forth herein.

21 126. Section X.D.1 of the General Permit requires each Facility to establish a Pollution  
22 Prevention Team responsible for assisting with the implementation of the requirements of the  
23 General Permit. The Facility is also required to identify alternate team members to implement  
24 the SWPPP and conduct required monitoring when the regularly assigned Pollution Prevention  
25 Team members are temporarily unavailable (due to vacation, illness, out of town business, or  
26 other absences).

127. Section X.H.f of the General Permit also requires that each facility ensure that all  
1 of its Pollution Prevention Team members implementing the various compliance activities of the  
2 General Permit are properly trained in at least the following minimum requirements: BMP  
3 implementation, BMP effectiveness evaluations, visual observations, and monitoring activities.  
4 Further, if a Facility enters Level 1 status, appropriate team members must be trained by a QISP.  
5

128. Since at least July 15, 2014, Defendants have failed to properly train Facility  
7 employees and the designated members of its Pollution Prevention Team, which has resulted in  
8 the General Permit violations alleged herein.

10 **RELIEF REQUESTED**

11 WHEREFORE, Plaintiff respectfully requests that the Court enter judgment providing  
12 the following relief:

14 1. Declare Defendants to have violated and to be in violation of the CWA;  
15 2. Issue an injunction ordering Defendants to immediately operate the Facility in  
16 compliance with the NPDES permitting requirements contained in the General Permit and the  
17 CWA;

19 3. Enjoin Defendants from discharging pollutants from Defendant WESTERN  
20 COLLOID's Facility to the surface waters surrounding the Facility until such time as  
21 WESTERN COLLOID has developed and implemented an adequate SWPPP and implemented  
22 appropriate BMPs;

24 4. Order Defendants to pay civil penalties of \$51,570 per day/per violation for each  
25 violation of the Act pursuant to 33 U.S.C. §§ 1319(d), 1365(a) and 40 C.F.R. §§ 19.1, 19.2-19.4;

27 5. Order Defendants to take appropriate actions to restore the quality of United  
28 States waters impaired by its activities at WESTERN COLLOID's Facility;

1       6. Order Defendants to pay EDEN's reasonable attorneys' fees and costs (including  
2 expert witness fees), as provided by 33 U.S.C. § 1365(d) and applicable California law;

3       7. Award Plaintiff additional attorney fees under California Code of Civil Procedure  
4 §1021.5, to the extent that Plaintiff's Notice of Intent to Sue directed to Defendants was the  
5 catalyst for Defendants' voluntary corrective action or cessation of the violations included in  
6 Plaintiff's Notice, provided that Defendants undertook any such corrective action after receiving  
7 Plaintiff's Notice, and;

8       8. Award such other and further relief as may be just and proper.

9  
10 Dated: July 11, 2019

11 Respectfully,

12 By: Craig A. Brandt  
13 Craig A. Brandt  
14 Attorney for Plaintiff